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RULE PROPOSALS

AGRICULTURE DIVISION OF AGRICULTURAL AND NATURAL RESOURCES STATE SOIL CONSERVATION COMMITTEE

45 N.J.R. 1877(a)

Proposed Changes: *N.J.A.C. 2:90-1.3, 1.13, and 1.14*

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Notice of Proposed Substantial Changes Upon Adoption to Proposed Amendments

Soil Erosion and Sediment Control on Land Disturbance Activities

Proposed: July 2, 2012 at *44 N.J.R. 1813(a)*; see also *44 N.J.R. 2015(a)*.

Authorized By: State Soil Conservation Committee and Douglas H. Fisher, Secretary, Department of Agriculture.

Authority: *N.J.S.A. 4:24-3, 4:24-41, 4:24-42, and 4:24-42.1*.

Submit comments by October 4, 2013 to:

Frank Minch
Coordinator, Soil and Water Conservation Programs
State Soil Conservation Committee
New Jersey Department of Agriculture
PO Box 330
Trenton, NJ 08625-0330
Email: SSCCrules@ag.state.nj.us

Take notice that on July 2, 2012, the Department of Agriculture, Division of Agricultural and Natural Resources, and the State Soil Conservation Committee proposed amendments to *N.J.A.C. 2:90-1.1* through *1.5, 1.8, 1.9, 1.11, 1.13, 1.14, and 1.16*. Subsequently, the Department of Agriculture, Division of Agricultural and Natural Resources, and the State Soil Conservation Committee discovered that errors of omission occurred in the second, third, and fourth paragraphs of the Summary and in the Economic Impact statement in the notice of proposal. A notice of administrative corrections was published pursuant to *N.J.A.C. 1:30-2.7*, to revise the Summary and the Economic Impact statements and

provide the additional information inadvertently left out of the notice of proposal. The comment period on the notice of proposal was extended 35 days to October 5, 2012.

The Department adopted significant changes to the Permanent and Temporary Vegetative Cover for Soil Stabilization standards in the "Standards for Soil Erosion and Sediment Control in New Jersey," on April 8, 2013, which is incorporated into *N.J.A.C. 2:90-1.3* by reference, in response to comments received that are individually, as well as collectively, significant enough to, as a matter of prudence, allow for the public to offer comments in advance of enforcing those changes. A summary of the comments that prompted changes, and the agency responses to the comments, is provided below. This notice of proposed substantial changes is published pursuant to *N.J.S.A. 52:14B-4.10*.

Comments that prompted changes were received from the following six individuals/entities: Richard Dovey - Cape-Atlantic SCD (1), Robert Reitmeyer - Burlington SCD (2), Robyn Jeney - Pinelands Commission (3), Amy Karpati, Pinelands Preservation Alliance (4), Richard Shaw, Marilyn Mroz - NJ Association of Professional Soil Scientists (5), and William Pollock - Ocean SCD (6).

N.J.A.C. 2:90-1.3(a)1 Vegetative Standards

Permanent Vegetative Cover

1. COMMENT: The commenter states "4A: new sentence about visual cues is inconsistent with the very next sentence stating so that approximately 85% of the soil surface will be covered. If you want to say 100% then say it, or, provide a range of 85-100%. Suggest that it read 'at least 85% coverage.'" (6)

RESPONSE: The Department agrees that the language regarding visual cues may be inconsistent and has eliminated the reference to a range and clarify that mulch be spread uniformly, so that at least 85 percent of the soil surface will be covered.

2. COMMENT: The commenter states "Table 4-3 footnotes #6: Spring seeding is best. This statement is inaccurate. The standards clearly show an optimal seeding season in both the spring and fall. As a matter of observation, late summer and early fall seeding do not have to deal with excessive competition from weeds and drought stress during the summer months. If you are trying to make some other point the sentence clearly needs to be restated." (6)

RESPONSE: The Department agrees and has removed Table 4-3 footnote number 6 from the final version.

3. COMMENT: The commenter states "Page 4-2, 'Table 4-1, Limestone Application Rate by Soil Texture' and the statement, 'Uniformly apply ground limestone and fertilizer to topsoil which has been spread and firmed, according to soil test recommendations such as offered by Rutgers Co-operative Extension for best results.' In light of state-wide efforts to not apply excess materials, we strongly recommend that the phrase, 'for best results', be omitted. We recommend that the straightforward statement be made to require liming in accordance with soil test results. Such statement is consistent with standard practice in the profession. It is also consistent with state-wide practice in other agencies and with state-wide efforts to apply only the amounts needed and no more. To diverge from this practice is to invite application of excess amounts that can result in degraded water quality, and insufficient amounts that result in poor stands of vegetation. Particularly given our red shale soils and their naturally low pH, many sites are prone to needing limestone. Identifying the amount of lime needed by a simple soil test is an inexpensive, prudent, and practical step toward achieving a good stand of permanent vegetation." (5)

RESPONSE: The Department agrees and has changed the Standard to remove "for best results," and to require liming in accordance with soil test results and has remove Table 4-1(general liming rates).

[page=1878] 4. COMMENT: The commenter states, "Page 4-4, Item 5. Remove 'and mulch is not used'. This contradicts Item 4 on page 4-3 'Mulching is required on all seeding'." (1)

RESPONSE: The Department agrees and has removed the statement "and mulch is not used."

5. COMMENT: The commenter states, "Page 4-14. Paragraph 2. The practices are limited to areas or relatively flat terrain ... The term 'relatively flat' is ambiguous. Suggest quantifying an acceptable % slope. (i.e. 0 - 1% slope)." (1)

RESPONSE: The Department agrees and has changed the Standard to identify a slope of "less than 2%" to define what was previously described as, "relatively flat terrain."

6. COMMENT: The commenter states, "Page 4-14 Site/Seedbed Preparations Item 1 & 2. In the absence of Pinelands A Horizon soils there should be notes regarding establishment of a soil layer that would be beneficial to the establishment of a vegetative cover." (1)

RESPONSE: The Department agrees and has clarified Site/Seedbed Preparation, item 2, on page 4-14 with the comparative reference that any non-native PNR "soil shall be equal to or less than that of the native soil on the project site."

7. COMMENT: The commenter states, "The term (sic) '... and vegetation is established' is vague. Recommend clarifying with note similar to permanent vegetative notes (80% coverage). Page 4-15, Items e and f."; "The term 'adequate' to describe the condition of the permanent vegetative cover is ambiguous. This should be quantified similar to permanent vegetative cover standard (80% coverage)." (1)

RESPONSE: Established vegetation refers to well started vegetation consistent with achieving a permanent vegetative cover. The Department provides further clarification through the following footnote on page 4-14: "Adequate cover is defined as no visible evidence of off-site erosion with the natural re-colonization appearing to have the same spacing (if not height) as undisturbed vegetation in the immediate vicinity."

8. COMMENT: The commenter states, "Page 17 Pinelands Natural Regeneration Process. Flow chart should be amended. Permanent Stabilization with Pinelands approved ??? Seems as if part of that sentence is missing. Also, need to add another box to the right track 'Satisfactory Establishment a Permanent Vegetative Cover.'" (1)

RESPONSE: The Department agrees and has expanded the format to reveal the remaining portion of the sentence (partially obscured by the text box) and changed the flow chart boxes to follow the same pathway for mulching (according to the Standard), monitoring, and final establishment of satisfactory vegetative cover.

9. COMMENT: The commenter states, "4-2 Item #2 under 'Site/Seedbed Preparation' indicates that pH and nutrient measurements of any non-native PNR soil must be equal to or less than that of the native soil on site. We recommend that 'nutrients' be specifically defined as the various forms of nitrogen and phosphorous in the non-amended native sub-soil. The use of 90% sand may be added as an alternative to demonstrating that the pH and nutrient measurements of the alternate backfill are equal to or less than that of the non-amended soil on the project site." (3)

RESPONSE: The Department has extensively researched the issues raised in this comment. The Department has included the definition of "nutrients" consistent with readily available data on the United States Department of Agriculture Natural Resources Conservation Service (USDA-NRCS) Web Soil Survey for native Pinelands soils and easily tested in non-native soils in Note two, page 4-13.

10. COMMENT: The commenter states, "Nutrient levels of any non-native Pinelands soil should be defined as the various forms of nitrogen and phosphorus, not just referred to as 'nutrients.' These are the two soil nutrients whose levels impact native vegetation the most." (4)

RESPONSE: This comment was extensively examined and the Department has included a definition of "nutrients" that is readily available as data on the USDA-NRCS Web Soil Survey for native Pinelands soils and easily tested in non-native soils in Note two, page 4-13."

11. COMMENT: The Pinelands seed mixtures listed in Table 4-4 raise some concerns regarding the inclusion of the following non-native plant species: Deertongue (*Dichanthelium clandestinum*), partridge pea (*Chamaecrista fasciculata*), roundheaded bush clover (*Lespedeza capitata*), and Canada wildrye (*Elymus canadensis*). However, the general lack of commercially available native Pinelands seed creates a challenge but listing such species in the standards could motivate commercial growers to propagate and sell beneficial natives. One option may be to identify additional native Pinelands plant species that would be appropriate for a revegetation seed mix. We encourage the SSCC to add additional Pinelands native plant species to the list of recommended seed mixes. Actual use of recommended species is of course constrained by the commercial availability of species. Some of the more easily obtained species we recommend listing in addition to those currently listed include: Six Weeks Fescue (*Vulpia octoflora*), Three-Awn Grass (*Aristida longispica*), Perennial Cool Season Grasses: Poverty Oat Grass (*Danthonia spicata*), Silky Wild Oat Grass (*Danthonia sericea*), Ticklegrass (*Agrostis hyemalis*), variable panic grass (*Dichanthelium commutatum*), *Dichanthelium* species (*Dichanthelium sphaerocarpon*, *Dichanthelium depauperatum*, *Dichanthelium meridionale*, and *Dichanthelium sabulorum*), Butterfly-weed (*Asclepias tuberosa*), Grass-leaf Blazing-star (*Liatris pilosa*), Hyssop-leaved Boneset (*Eupatorium hyssopifolium*), Maryland Goldenaster (*Chrysopsis mariana*), Sweet Goldenrod (*Solidago odora*), Toothed Whitetop Aster (*Sericocarpus asteroides*), Trailing Tick-Trefoil (*Desmodium rotundifolium*), Maryland goldenaster

(*Chrysopsis mariana*), etc. We recommend that applicants proposing the use of listed non-native species be required to provide a written statement explaining why native species are not being used, with lack of commercial availability being the acceptable response until such species are available. (3 and 4)

RESPONSE: The Department agrees that there is a lack of commercially available native Pinelands seed and, therefore, has identified additional Pinelands seed recommendations for native grasses and forbs in the Standard on page 4-16. The Department does not believe that it is necessary to also require a written statement concerning the use of listed non-native species because the identification and listing of such non-native species was done to accommodate the same concern (lack of commercial availability of native species). The Department does not believe that additional paperwork restating the fact that necessitated the development of the non-native list would further the interests incorporated in identification of native or non-native species.

12. COMMENT: The commenter states, "4-8 The 'Pinelands Natural Regeneration Process' flow chart on the final page of the Standard identifies two approaches: Temporary stabilization where permanent native vegetation is encouraged, and permanent stabilization with Pinelands approval. However, the text of the PNR Specifications subsection identifies the two approaches as 'Re-establishment of Native Vegetation without Seeding' and 'Reseeding with Pinelands Native Vegetation', respectively. We recommend that the flow chart language be revised to be consistent with the PNR Specifications text." (3)

RESPONSE: The Department agrees and has revised the chart language by incorporating the language contained in the PNR Specifications text in the Standard.

13. COMMENT: The commenter states, "4-9 The 'Pinelands Natural Regeneration Process' flow chart also indicates that mulch, pursuant to the Mulch Standard, is required as the final step for Permanent Stabilization. However, the text in the PNR Specifications subsection indicates that no mulch shall be placed over the seeded area. We recommend that the mulch requirement be removed from the flow chart in order to be consistent with the PNR Specifications text." (3)

RESPONSE: Data and experience suggest that mulch will benefit new seedlings in a variety of ways; moisture retention, temperature mitigation (both hot and cold) and protection from compaction and runoff due to rain impacts on bare soil. Straw mulch applied at a rate to simply cover the ground will provide benefits to a natural regeneration effort. The Department has revised the text to be consistent with the flow chart and be clear that mulching is required.

14. COMMENT: The commenter states, "While the text of these Specifications refers to the two stabilization approaches as 'Reseeding with Pinelands Native Vegetation' and 'Re-establishment of Native Vegetation without seeding,' the embedded flow chart (Pinelands Natural Regeneration Process) uses the terms 'Permanent Stabilization' and 'Temporary Stabilization.' These terms should be clarified and used [page=1879] consistently throughout the specifications. Also, the flow chart instructs the reader to 'mulch pursuant to mulch standard' as the last step in the 'Permanent Stabilization' pathway. However, under the text for 'Reseeding with Pinelands Native Vegetation,' it states that 'No mulch shall be placed over the seeded area.' This contradiction should be clarified by removing the mulch step in the flow chart." (4)

RESPONSE: The Department has revised the chart language to be consistent with text, as suggested. Data and experience suggest that mulch will benefit new seedlings in a variety of ways; moisture retention, temperature mitigation (both hot and cold) and protection from compaction and runoff due to rain impacts on bare soil. Straw mulch applied at a rate to simply cover the ground will provide benefits to a natural regeneration effort. The Department has revised the text to be consistent with the flow chart that mulching is required.

Temporary Vegetative Cover for Soil Stabilization

15. COMMENT: The commenter states "Temporary Stabilization: Now 14 days, not 60 days. (Federal mandate). This will have a sizable economic impact for applicants and should be addressed in the Economic Impact Statement." (6)

RESPONSE: As noted by the commenter, the Department has revised the limit of 14 days to be consistent with United States Environmental Protection Agency requirements for temporary stabilization as implemented through New Jersey Department of Environmental Protection Stormwater rules, *N.J.A.C. 7:8*.

16. COMMENT: Two commenters questioned the absence of specifications for the use of annual ryegrass as provided in the rule summary. (2 and 6)

RESPONSE: The Department acknowledges the error in the proposed amendments. The Department has added annual ryegrass as acceptable for temporary stabilization only.

N.J.A.C. 2:90-1.14(h) Reports of Compliance

17. COMMENT: The commenter states, N.J.A.C. "2:90-1.14(h) In the second line the term 'applicant'. Should the terms 'current project owner' and 'general contractor' be added here?" (1)

RESPONSE: The Department thanks the commenter and will substitute the term "current project owner" to the term "applicant" for clarity because the current project owner and the original applicant may be different. The Department declines to add the "general contractor" because this entity often changes and the "owner" is held responsible for compliance. The term "current project owner" is also added to *N.J.A.C. 2:90-1.13(d)*, for the same clarification issues.

Summary of Agency-Initiated Change:

As a result of the substantial changes discussed above to the Permanent Vegetative Cover for Soil Stabilization and the Temporary Vegetative Cover for Soil Stabilization, the revised date of the "Standards for Soil Erosion and Sediment Control in New Jersey," incorporated by reference into the chapter, was updated to April 8, 2013, and such date is hereby proposed to be updated in the text of *N.J.A.C. 2:90-1.3(a)*.

Effect of Proposed Changes on Impact Statements Included in Original Proposal

The changes to the proposed amendments will not affect the impact statements included in the original rule. The changes amend Standards to add additional information to clarify existing explanations or to correlate text and tables and changes clarify with more specific references. None of these changes affect the Social, Economic, Jobs, or Agriculture Industry Impact statements; the Federal Standards Statement; the Regulatory Flexibility Statement; or the Housing Affordability or Smart Growth Development Impact Analyses as published in the original notice of proposal.

Full text of the proposed substantial changes to the proposed amendments follows (additions to proposal indicated in italicized boldface *thus*; deletions from proposal indicated in italicized cursive brackets [thus]):

2:90-1.3 Standards for the Soil Erosion and Sediment Control

(a) The State Soil Conservation Committee adopts and hereby incorporates into [these] **the rules of this subchapter** by reference as standards for soil erosion and sediment control those standards published in the "Standards for Soil Erosion and Sediment Control in New Jersey" and identified as [adopted or] revised on [April 12, 1999] **[July 11, 2011] April 8, 2013** as the technical basis for local soil conservation district certification of soil erosion and sediment control plans. Specifically, these standards include the following:

1. Vegetative Standards

...

Permanent Vegetative Cover for Soil Stabilization..... 4-1

Revised [April 12, 1999] **[July 11, 2011] April 8, 2013**

...

Temporary Vegetative Cover for Soil Stabilization..... 7-1

Revised [April 12, 1999] **[July 11, 2011] April 8, 2013**

...

2:90-1.13 Enforcement

(a)-(c) (No change.)

(d) The district or the municipality may issue a stop-construction order if the applicant/*current project owner* [takes no] **fails to take a majority of identified** actions to comply with the provisions of the certified plan. The district or municipality may issue a stop-construction order if a person initiates land disturbance prior to securing plan certification **or fails to renew plan certification on an active project within 30 days of receiving notice of pending expiration from the district or municipality.**

(e) (No change.)

2:90-1.14 Reports of Compliance

(a)-(g) (No change from proposal.)

(h) Copies of the ROC, [or] CRC, **or FROC** shall be distributed by the [District] **district** to the applicant/*current project owner*; the municipal construction code official having construction code jurisdiction for the project, if applicable; and/or in the case where a construction permit is not required for a project (such as for mining and land clearing projects among others), the municipal official having jurisdiction over such project, if any.

1.-2. (No change.)

(i)-(l) (No change from proposal.)